

**BEFORE THE STRUCTURAL PEST CONTROL
DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
Agricultural Commissioner of
the County of San Diego
(County File No. 515-SCP-SD-04/05)

Administrative Docket No. S-013

DECISION

License-To-Kill, Inc. (PR-4109)
Attn: Vincent Gomez
4618 Avocado Blvd.
La Mesa, California 91941

Appellant./

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) may levy a civil penalty up to \$5,000 for a violation of California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Diego CAC found that License-To-Kill, Inc. (appellant) violated Section 8505.7 of the California Business and Professions Code (B&P Code) by failing to secure the premises against entry until the end of exposure period and until safe for occupancy. The CAC levied a fine of \$1000.00 for the violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Kelli Okuma for the Structural Pest Control Board (SPCB), and Jodi Clary for the Department of Pesticide Regulation (DPR). The Committee heard oral argument via telephonic conference on September 5, 2006. The appellant was represented by Vincent and Cathy Gomez. The San Diego CAC was represented by Sally Lorang and Michael Giove.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Factual Background

On August 26, 2004, an inspector from the San Diego CAC's office visited the site of a house fumigation in Coronado, California. Upon arrival, the inspector noted that the house had been untarped but was still posted as unsafe to enter. The inspector walked around the house to determine if effective secondary locks had been installed on the outer doors to prevent entry by the homeowner or a member of the public. The inspector noted that no secondary lock was placed on the side door. The inspector noticed that a wire had been placed in the key slot in the door handle on the front door. After manipulating the wire with his pen, the inspector was able to remove the wire. The inspector contacted the fumigation company and requested that the responsible licensee return to the site.

Jay McClure returned to the site and identified himself as an employee of License-to-Kill, Inc. (LTK) and as the licensee responsible for supervising the fumigation. The house had been fumigated with Vikane and was in the aeration phase of the fumigation. Mr. McClure informed the inspector that the side door was secured by two security chains on the inside. Mr. McClure observed that the inspector was holding the wire that had been placed in the front door key lock. Mr. McClure stated that he had instructed the crew to secure the premises but did not inspect the secondary locks. The inspector issued a Notice of Violation for failure to place effective secondary locks on the house, a violation of BPC section 8505.7. Mr. McClure then replaced the wire in a manner so that the inspector was not able to remove the wire from the front door.

The CAC issued a Notice of Proposed Action (NOPA) on August 26, 2004 and proposed to fine LTK the sum of \$1,000. The NOPA charged LTK with a "serious" violation based on three prior "moderate" civil penalties levied against LTK. LTK's requested hearing was held on April 5, 2006. After hearing the evidence, the Hearing Officer found that LTK violated BPC section 8505.7 and that the fine in the serious range at the maximum level was justified. LTK filed this appeal before the Disciplinary Review Committee.

Applicable Statutes and Regulations

Business and Professions Code (BPC) section 8505.7 states “[t]he space to be fumigated shall be vacated by all occupants prior to the commencement of fumigation, and all entrances thereto shall be locked, barricaded, or otherwise secured against entry until the end of exposure period, then opened for ventilation and relocked, barricaded, or otherwise secured against re-entry, until declared by the licensee exercising direct and personal supervision over the fumigation to be safe for reoccupancy.”

The implementing regulation (16 CCR section 1970.3) explains the phrase “locked, barricaded, or otherwise secured against entry” as meaning that all structures, prior to fumigation, shall have a secondary lock on all outside doors. A secondary lock is to secure and prevent a door from being opened by anyone other than the licensee in charge. Pins are to be of a thickness to prevent the insertion of the door key.

CCR, title 16, section 1922 defines a “moderate” violation as one that is a repeat minor violation or a violation which poses a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$151-\$400. Also under section 1922, repeat moderate violations can be charged as “serious” violations with a fine range of \$401 to \$1,000.

Appellant's Contentions

Appellant contests several factual statements made by the inspector. Appellant asserts that the inspector is confused about the house and that the fumigation was done on two houses, one house having two doors and one house having one door, not on one house with three doors. Appellant asserts that his company properly secured the house and did not commit a violation. The Appellant asserts that it was the inspector's fault for removing the secondary lock. Appellant asserts that the inspector failed to write a complete inspection report and eighteen months later gave false testimony. The Appellant also asserts that the inspector changed his testimony by stating a new “pin” was put in the key lock and later stating the same wire was replaced in the key lock. Appellant asserts that Jay McClure was not properly served with the NOPA that resulted in an adverse civil penalty levied against him as an individual. Appellant requested public records to challenge the prior penalties and asserts without these records he cannot properly defend himself. Appellant asserts that the prior civil penalties cannot be held against him to increase this violation to a serious violation because the prior occurred more than two years ago and because none of the prior violations were committed by Jay McClure. As part of his appeal, Appellant requested that the Disciplinary Review Committee provide him copies of documents related to his prior civil penalty actions and the prior licensing action taken against him.

The Hearing Officer's Determination

The Hearing Officer made several administrative rulings related to this matter. First, he overruled Appellant's objections to the admission of County Exhibits 7, 8, and 9 relating to prior violations because the Hearing Officer found the documents were relevant to his determination of whether the prior violations could be used to determine a repeat violation. Second, he determined that Appellant did not have standing to contest the CAC's civil penalty action against Jay McClure. Third, the Hearing Officer held that the prior civil penalties had been adjudicated and that Appellant would not be allowed to re-open and re-litigate these actions. Fourth, the Hearing Officer could not find that the Public Records Act was violated as regards Appellant request for documents concerning the prior violations.

In his *Findings of Fact*, the Hearing Officer determined that the NOPA in the instance case was timely issued on January 18, 2005, over seven months before the running of the 1-year statute of limitations bar from the date of the violation, August 26, 2004. The Hearing Officer found that the structure was not secondarily locked properly and that only pins that can be removed from the lock's cylinder with a special tool are acceptable. The Hearing Officer determined that the CAC could not consider the Stipulation and Order resulting in a civil penalty against LTK dated December 26, 2001 as a prior violation because the violation occurred more than two years prior to the current NOPA. The Hearing Officer found that Appellant had two prior violations that resulted in civil penalties that occurred within the previous two years and that qualified as repeat violations. The Commissioner's orders in those actions were issued on November 24, 2003, well within two years of the issuance of this NOPA on January 8, 2005. In addition, LTK's registration certificate and operator's license was suspended for 15 days in an action brought by the Structural Pest Control Board which resulted in a final Board decision effective September 1, 2004.

The Hearing Officer determined that LTK could not assert Mr. McClure was an independent contractor and LTK could not use the independent contractor defense in this action. The Hearing Officer also found that Appellant had not presented any evidence to show that he was the victim of selective enforcement. The Hearing Officer concluded that LTK had violated BPC section 8505.7 and that the \$1,000 fine was at the maximum possible under the fine guidelines set out in CCR, Title 16, section 1922.

The Hearing Officer noted that the testimony of the inspector and of Mr. McClure was in direct conflict with regard to the number of doors involved, the number of structures involved, and the existence of secondary locks on those doors. The Hearing Officer determined, based on his evaluation of the internal inconsistencies in the testimony, the relative demeanor of the witnesses and their relationships to the parties, corroborating documentary evidence and the failure of Appellant to impeach the inspector on cross-examination, that the conflict in the testimony would be resolved in favor of the inspector's credibility and powers of observation.

The Hearing Officer determined that the facts show that Appellant violated BPC section 8505.7 because two entrances to the house were not properly secured by Appellant's employees. The Hearing Officer found that only pins that can be removed from the lock's cylinder with a special tool are acceptable and that the front door had a wire that was easily removed using a writing pen. The Hearing Officer also found that the side door to the residence had no secondary lock.

Analysis

The Hearing Officer's refusal to hear evidence regarding the prior violations is appropriate, as is the Hearing Officer's refusal to find a violation of the Public Records Act. Appellant does not have standing to assert a defense on behalf of Jay McClure. There was no evidence in the record to support an independent contractor defense on behalf of LTK. There was no evidence in the record to support the assertion that LTK was subjected to selective prosecution. The Committee agrees with the Hearing Officer's determinations and the CAC's order adopting the determinations on these issues.

The true issue in this case is whether LTK properly secured the premises with secondary locks. The Hearing Officer found that the side door was not properly secured. The finding was based on the Hearing Officer's determination that the inspector's testimony was more credible than that of Jay McClure. The Committee is bound by the Hearing Officer's determination of credibility and finds that sufficient evidence exists in the record to support the finding that the side door was not properly secured in violation of BPC section 8505.7.

The Hearing Officer also found that the front door was not properly secured because the "pin" used could be removed without using a special tool. The regulations require that pins shall be of a thickness to prevent the insertion of the door key. However, the Vikane label states that the secondary lock is to be demonstratively effective in preventing an exterior door from being opened by normal means by anyone other than the licensed applicator. The Vikane Fumigation Manual (Exhibit H) states that the structure must be reasonably secure against inadvertent or illegal entry. Secondary locks such as clamshells, keyway locks and chains are recommended. Pins and staples are not recommended unless they are the only option and can only be removed with a special tool. Appellant argues that the inspector removed the pin with a special tool (his pen), and had special knowledge of how to remove the pin. Appellant testified that the only way to secure the front door was by using a pin. The inspector testified that appropriate pins should be removable by a special tool, such as a magnet. Considering the very dangerous nature of Vikane and the clear language of the Vikane Fumigation Manual, it is clear that a more secure method than placing a piece of wire in the lock is necessary. If LTK's licensee had properly inspected the locks placed by the crew, perhaps the violation could have been prevented. The Committee agrees with the Hearing Officer's determination that only a pin that must be removed by a special tool is appropriate and that LTK violated BPC section 8505.7.

CCR, title 16, section 1922 defines a "moderate" violation as one that is a repeat minor violation or a violation which poses a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$151-\$400. Also under section 1922, repeat

moderate violations can be charged as "serious" violations with a fine range of \$401 to the maximum fine amount. The violation here is one that would create a reasonable possibility of creating a health effect due to the very toxic nature of the pesticide involved (Vikane) and the likelihood of harm to any person who enters the premises before it is certified safe to re-enter. The violation in this instance was classified as serious because it is a repeat moderate violation. The \$1,000 maximum fine ordered here is appropriate.

Appellant argues that the county cannot charge a repeat violation because the prior violations were more than two years ago and because none of the prior violations were committed by Jay McClure. CCR, title 16, section 1922 does not define "repeat" violation. However, the analogous regulation in CCR, title 3, section 6130, governing agricultural civil penalties levied by the CAC for pesticide use violations, as well as guidelines issued by the Department of Pesticide Regulation to CACs with respect to their enforcement of structural pest control laws (Enforcement Letter, ENF-2003-027) support the Hearing Officer's interpretation of the term "repeat" as a civil penalty being levied against the employer in the same violation class within 2 years of the date of the NOPA in the current action.¹ The regulation does not require that the same person must commit the previous violations to charge a repeat violation against the employer. There was sufficient evidence presented at hearing that the *employer* committed two previous violations in the two years prior to the instant violation and the imposition of a fine based on a repeat violation is proper. The Committee agrees with the CAC's fine level based on a repeat violation.

Conclusion

The record demonstrates that the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The San Diego CAC's decision is affirmed. The Commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The \$1000 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
1418 Howe Avenue, Suite 18
Sacramento, California 95825

¹ Appellant asserts that a repeat violation can be charged only against the *person* who committed the prior violation. "Person" is defined by FAC section 38 as meaning any individual, partnership, association, corporation, limited liability company, or any organized group of persons whether incorporated or not. The use of the phrase "person" in 16 CCR section 1922 or 3 CCR section 6130 does not limit the meaning to an individual.

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Judicial Review

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: November 15, 2006

By: Jodi Clary

Jodi Clary, Member

For and with the concurrence of all members
of the Disciplinary Review Committee